No. 480.

Brief of Williams for Pltff. in Err. on Mo. to Dismiss

Filed Oct. 16, 1897.

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(16643.)

In The Supreme Court of the United States.

OCTOBER TERM, 1897.

THE CENTRAL LOAN & TRUST CO.,

Plaintiff in Error and Appellant,

No. 480. vs.

THE CAMPBELL COMMISSION CO.,

Defendant in Error and Appellee.

IN ERROR TO AND APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA.

Brief For The Central Loan & Trust Co., Appellant and Plaintiff in Error on the Motion to Dismiss Filed by the Appellee and Defendant in Error.

WILLIAM D. WILLIAMS,

Attorney for the Central Loan & Trust Co., Appellant and Plaintiff in Error.

W. D. BISHOP, Printer, 312 Main.

(*16643.*)

In The Supreme Court of the United States.

OCTOBER TERM, 1897.

THE CENTRAL LOAN & TRUST CO.

Plaintiff in Error and Appellant,

No. 430. vs.

THE CAMPBELL COMMISSION CO.,

Defendant in Error and Appellee.

IN ERROR TO AND APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA.

Brief For The Central Loan & Trust Co., Appellant and Plaintiff in Error on the Motion to Dismiss Filed by the Appellee and Defendant in Error.

WILLIAM D. WILLIAMS,
Attorney for the Central Loan & Trust Co., Appellant and Plaintiff in Error.

STATEMENT OF THE CASE AS TO THE INTERPLEA OF A. H. PIERCE.

Suit was filed in the District Court of Noble county, Oklahoma Territory on the 2nd day of July, 1895, by the Central Loan & Trust Co, plaintiff, against the Campbell Commission Co., defendant, on a promissory note for fifteen thousand dol-

lars ($15,000), with interest at eight (8) per cent per annum from September 1st, 1894. This note was not due when suit was filed. (Rec. 6). On July 2nd, 1894, the plaintiff, the Central Loan & Trust Co. filed its affidavit for attachment against the defendant (Rec. 7) and on the same day said plaintiff filed an affidavit for application for attachment. (Rec. 8). The order allowing the attachment was made and the writ of attachment was issued on the same day. (Rec. 8 and 11). The writ of attachment was executed July 3rd. 1895, by levying the same upon five thousand head of steer cattle (Rec. 11). July 6th, 1895, plaintiff made affidavit for writ of garnishment against one A. H. Pierce (Rec. 13) and the writ of garnishment was issued and served on the garnishee on the same day. (Rec. 13 and 14). August 26th, 1895, Pierce filed an answer in garnishment denying the possession of any of defendant's property and denying that he was indebted to defendant. (Rec. 19 to 23). This answer was never controverted and no judgment or action of the Court was ever had on the same. On the same day, August 26th, 1895, Pierce filed an interplea claiming the attached cattle. This interplea which was sworn to does not allege ownership in Pierce of the said cattle, but states he was entitled to the possession thereof and that said cattle had been wrongfully taken from him by plaintiff's attachment. (Rec. 16 and 17). On the same day, August 26, 1897, Pierce filed a motion which was not verified by affidavit, asking the discharge of plaintiff's attachment, because of certain facts urged in the motion. (Rec. 17 and 18). No action was ever had and no judgment was ever rendered on this interplea or motion. On September 7th, 1895, plaintiff asked the appointment of A. H. Pierce as receiver af the attached property, and on the same day he was appointed receiver without bond and was ordered to sell the cattle, and out of the proceeds to pay himself the amount of a lien claimed by him on

the said cattle and to hold the balance subject to the order of the Court. (Rec. 24 and 28). The right and interest which Pierce had claimed in said cattle, as shown by his interplea (Rec. 16) and by his answer in garnishment (Rec. 19 to 23) arose out of a contract which he stated in full in his answer in garnishment and by the terms of which he sold the attached property to the defendant in the lower court, the Campbell Commission Company, reserving a lien on the same and the right to retain the possession of said cattle to secure an unpaid balance of the purchase money. (Rec. 19 and 20). The right of Pierce to his lien and to the payment of the unpaid purchase money was conceded by plaintiff in its application for the appointment of a receiver (Rec. 24) and was protected by the Court in its order appointing Pierce receiver of said cattle with the right to sell the same and pay himself out of the proceeds. (Rec. 27). The order appointing Pierce receiver was approved by his attorney (Rec. 29) and Pierce accepted and qualified as receiver. (Rec. 29). Pierce afterward filed his report as receiver showing that he had sold the attached property and that out of the proceeds he had paid himself the full amount of the purchase money debt claimed by him in his interplea and answer in garnishment and that he still held as such receiver a balance of twenty-two thousand three hundred and sixty-one dollars and sixty-four cents ($22, 361.64), to which he made no claim and which he held subject to the order of the Court. (Rec. 38 to 42).

PROPOSITION.

A party to an action who has no legal interest in maintaining or reversing the judgment is not a necessary party to a writ or error or appeal from such judgment.

ARGUMENT.

This disposes of the Pierce interplea. He obtained satisfaction of every right which he claimed. His interplea was not brought to judgment. Every claim which he made in his answer in garnishment and in his interplea has been fully satisfied. Not only were his rights conceded by the plaintiff but they were also conceded by the interplea of W. A. Stoddard. (Rec. 31) and by the interplea of G. W. and J. C. Miller. (Rec. 44 to 46). No party to the suit claimed anything against Pierce nor has Pierce an unsatisfied claim against any party to the suit. He was therefore not a proper parry to an appeal or writ of error.

AUTHORITIES.

People vs. San Pablo, 149 U. S., 308.
Little vs. Bowers, 134 U. S., 547.
Ferguson vs. Smith, 10 Kan., 394.

Statement of the Case as to the Interpleas of T. A. Stoddard and Miller & Son:

On September 21, 1895, T. A. Stoddard filed an interplea in the trial court alleging that he as trustee for certain preferred creditors of the defendant the Campbell Commission Company, was entitled to the attached cattle, subject tc the rights of A. H. Pierce. This interplea stated the contract made by Pierce for the sale of the cattle to the defendant The Campbell Commission Company, and alleged that the real parties to said contract were A. H. Pierce on the one part and Miller & Son on the other, and that the contract was put in the name of the Campbell Commission Company to secure it

in the payment of certain debts which were owing to it by said Miller & Son. That the Campbell Commission Company had transferred its interest in said cattle to the said Stoddard as trustee to secure the payment of certain debts which were owing by the commission company and which it claimed were incurred for the benefit of Miller & Son. (Rec. 31 to 38.) On November 5, 1895, the plaintiff the Central Loan and Trust Company demurred to the interplea of Stoddard. (Rec. 43.) The attention of the court is called to the fact that the interplea of Stoddard was filed before the date of plaintiffs' motion to require said Stoddard to interplead, and that it was not filed in response to said motion or to the order made on the motion. (Rec. 30 and 31.) No action was ever taken on the interplea of Stoddard or on the demurrer interposed to the same by the Central Loan and Trust Company, and no judgment was rendered and no order was made on the interplea.

November 25, 1895, Miller & Son filed an interplea alleging that they owned the attached cattle and denying that the Campbell Commission Company or T. A. Stoddard as trustee had any interest in the same. (Rec. 44 to 46.) No answer to this interplea was filed by any of the parties to the suit and the interplea was never acted upon or brought to judgment, and no order of any kind was made upon the same. The receiver holds $22,361.64, which is not disposed of by the judgment dismissing plaintiffs' suit and which, in fact, has never been disposed of to this day.

On November 11, 1895, the defendant, the Campbell Commission Company, filed an amended plea to the jurisdiction (Rec. 43), and on December 16, 1895, said commission company substituted another amended plea to the jurisdiction (Rec. 49 and 50), which was heard by the court on the same day, to-wit, December 16, 1895, and was sustained by the

court, and plaintiffs' attachment proceedings were quashed and plaintiffs' suit dismissed. (Rec. 50 to 52.) The Central Loan and Trust Company sued out a writ of error to the Supreme Court of Oklahoma Territory, to which writ of error the Campbell Commission Company alone was defendant. (Rec. 3.) This writ of error was considered without objection by the Supreme Court of Oklahoma and the judgment of the lower court affirmed. (Rec. 54.) A motion for rehearing was filed (Rec. 65), notice of which was given to the attorneys of the Campbell Commission Company alone. (Rec. 64.) The motion for rehearing was overruled June 14, 1897. (Rec. 76.) In all the proceedings in the Supreme Court of Oklahoma Territory no objection was made to the want of proper defendants to the writ of error which was being heard in that court, and the objection is raised in this court for the first time.

FIRST PROPOSITION.

An intervenor who is not a party to a judgment cannot prosecute an appeal or writ of error, nor can anyone be made a defendant to an appeal or in a writ of error who was not a party to the judgment in the lower court.

ARGUMENT.

The plaintiff in the lower court, the Central Loan and Trust Company, sought to give the court jurisdiction of a suit on a note not yet due and at the same time to acquire a lien on certain property owned by the defendant, the Campbell Commission Company, by suing out a writ of attachment, and caused the same to be levied upon property within the jurisdiction of the trial court, the title and possession of which property was in said commission company. The interpleader Stoddard claimed the property against both plaintiff and de-

fendant but sued out no process against the defendant, and did not seek in any way to give the defendant notice, real or constructive, of his claim or to bring his interplea to the notice of the court and to secure the action of the court on the same. The same may be said of the interplea of Miller & Son. These parties filed their interpleas and did nothing further. No judgment was rendered on either interplea and no action of the court whatever was had upon the same. The right to the attached property or its proceeds was not passed upon. The interpleaders were not parties to the final judgment or to any proceedings had to reverse the same. Since no one can be made a defendant in a writ of error or a party to an appeal who was not a party to the judgment of the lower court, it follows that neither Stoddard nor Miller & Son could have been made parties to this appeal or writ of error.

AUTHORITIES.

Payne vs. Niles, 20 How., 219.

SECOND PROPOSITION.

The appeal and writ of error of the Central Loan and Trust Company applies to so much of the case and such of the parties to the suit as are necessary for the determination of the rights of the appellant and plaintiff in error.

ARGUMENT.

If the interpleaders are parties to the final judgment, still the judgment is not joint against them and the Central Loan & Trust Company. The attached property had not been disposed of and the rights of the interpleaders in the same has not been adjudicated. The only matter determined and passed upon by the judgment dismissing the suit of the Central Loan & Trust Company was the question whether said

Company could maintain its suit againt the Campbell Commission Company. The motion for rehearing was denied in the Supreme Court of Oklahoma on the 14th day of June, 1897, and an appeal was taken and notice of the appeal was given and allowed in open court at the time the judgment was rendered. (Rec. 76). At the same time the Central Loan & Trust Company in open court prayed the allowance of a writ of error to the Supreme Court of the United States and the writ of error was allowed by the Court and the amount of the supersedeas bond was fixed. (Rec. 76 and 77). Two orders are shown in the record, one on page 76 and the other on page 77, and it appears that the latter was probably a correction in some matter of form of the former.

AUTHORITIES.

Milner vs. Meek, 96 U. S., 252.

THIRD PROPOSITION.

If the Supreme Court should hold that the parties who filed interpleas in the trial court are necessary parties to an appeal or writ of error, then still the record shows the names of the interpleaders, and the defect, if any there be, can be remedied by reference to the record filed in this appeal and writ of error, and the Court will not dismiss because of such defect.

ARGUMENT.

The appellee and defendant in error the Campbell Commission Company urges that it appears from the record that there are certain parties who intervened in this suit in the trial court and who should have been made parties to the appeal and writ of error. The names of these parties are shown by the record, and the defect, if it is a defect, is in the making of

parties to the appeal and to the writ of error. This defect can be cured under the United States Statutes if it exists at all and the plaintiff in error understands the rule to be that where a defect of this character can be cured, the Supreme Court will not dismiss.

AUTHORITIES.

Rev. Stat., U. S., Sec. 10005.
Moore vs. Simonds, 100 U. S., 145.

FOURTH PROPOSITION.

Neither T. A. Stoddard, nor Miller & Son, have any legal interest in maintaining or reversing the judgment dismissing plaintiffs' suit and they are not necessary parties to a writ of error or appeal from said judgment.

STATEMENT.

Both Stoddard and Miller & Son claim the proceeds of the attached property. Such proceeds are not disposed of by the judgment dismissing plaintiffs' suit.

AUTHORITIES.

People vs. San Pablo, 149 U. S., 308.
Little vs. Bowers, 134 U. S., 547.
Ferguson vs. Smith, 10 Kan., 394.

FIFTH PROPOSITION.

Defendant in error and appellant voluntarily submitted itself to the jurisdiction of the Supreme Court of Oklahoma Territory on writ of error to that court, and if it ever had any right to question the jurisdiction of that court it has waived the same and cannot raise such question in this court for the first time.

STATEMENT.

The Campbell Commission Company submitted itself to the jurisdiction of the Supreme Court of Oklahoma Territory. It made no question in that court as to its jurisdiction. The question is first raised after the case has left the court, the jurisdiction of which is now disputed.

AUTHORITIES.

Field vs. Burton, 71 Ind., 380.

For the reasons stated the Central Loan and Trust Company, appellant and plaintiff in error, prays that the motion to dismiss filed in this cause by the Campbell Commission Company, appellee and defendant in error, be overruled.

Respectfully submitted,

WILLIAM D. WILLIAMS,
Attorney for the Central Loan and Trust Co.,
Appellant and Plaintiff in Error.

No. 145.
Brf. of Williams for Pl. in Err. & App.
Office Supreme Court, U. S.
FILED
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Filed Aug. 2, 1898.

IN THE

Supreme Court of the United States.

The Central Loan and Trust Company,
Plaintiff in Error and Appellant,

vs. No. ~~[illegible]~~ 145

The Campbell Commission Company,
Defendant in Error and Appellee.

Brief for The Central Loan and Trust Company, Plaintiff in Error and Appellant.

WILLIAM D. WILLIAMS,
Attorney for Plaintiff in Error and Appellant.

Lawrence Davis Printing Co., 709-711 Main St., Fort Worth, Texas.

IN THE

Supreme Court of the United States.

The Central Loan and Trust Company,
Plaintiff in Error and Appellant,

vs. No. 430.

The Campbell Commission Company,
Defendant in Error and Appellee.

Brief for The Central Loan and Trust Company, Plaintiff in Error and Appellant.

WILLIAM D. WILLIAMS,
Attorney for Plaintiff in Error and Appellant.

SATEMENT OF THE NATURE AND RESULT OF THE SUIT.

On the 2nd day of July, 1895, this suit was brought in the District Court of Noble County, Oklahoma Territory, by the Central Loan and Trust Company, a private corporation organized in the State of Texas, against the Campbell Commission Company, a private corporation organized in the State of Missouri, on a promissory note, executed by said Commission Company and duly transferred to said Loan and Trust Company, dated September 1st, 1894, for fifteen thousand ($15,000.00) dollars, payable two years after date with interest at

eight (8) per cent. per annum from date until paid. When the suit was filed the note sued on had not become due. (Printed Rec. 6).

On July 2nd, 1895, a summons was issued in the case for the defendant Commission Company, and on July 12th, 1895, it was returned not executed, said Commission Company not having been found within the County in which the suit was filed (Printed Rec. 10).

On July 29th, 1895, affidavit was made for service by publication (Printed Rec. 14), and a publication notice was printed notifying the defendant to appear and answer on or before September 13th, 1895 (Printed Rec. 15).

At the time of filing this suit, the Loan and Trust Company, plaintiff, applied for a writ of attachment upon the ground that the defendant, the Campbell Commission Company, was a foreign corporation and was about to sell and convey its property with the fraudulent intent to hinder and delay its creditors in the collection of their debts (Printed Rec. 7).

The judge of the District Court of Noble County, in which county said action was begun, was absent from the county and the application for an order allowing an attachment was made to the judge of the probate court of said county and the order was granted by said probate judge (Printed Rec. 8), and a writ of attachment was issued and delivered to the sheriff of Noble County (Printed Rec. 11). The sheriff levied the attachment, on July 3rd, 1895, upon five thousand (5,000) head of steer cattle, which were seized in said Noble County as the property of said defendant, the Campbell Commission Company, and were appraised at twenty-five ($25.00) dollars each (Printed Rec. 11 and 12).

On July 6th, 1895, a summons in garnishment was issued in said cause and served upon one A. H. Pierce (Printed Rec. 13 and 14), who filed an answer on August, 26, 1895, (Printed Rec. 19 et seq). and who on the same day filed an interplea in the original suit (Printed Rec. 16 et seq).

On September 31st, 1895, one T. A. Stoddard filed his interplea in said original cause (Printed Rec. 31 et seq.),

and on November 25th, 1895, George W. Miller and J. C. Miller filed their interplea (Printed Rec. 44 et seq.).

Each of the different parties who filed interpleas as above stated claim to own the cattle which had been levied upon under writ of attachment as before stated.

A. H. Pierce was appointed receiver of the said cattle (Printed Rec. 27 and 28), and sold the same under an order of the court, and the proceeds of such sale, after the payment of certain debts and expenses, amount to over $22,000.00, and are now in the hands of said Pierce as receiver, (Printed Rec. 38 et seq.).

On the 11th of November, 1895, the Campbell Commission Company filed an amended plea to the jurisdiction (Printed Rec. 43), which was still further amended on the 16th day of December, 1895 (Printed Rec. 49), and was on that day heard by the court and sustained, for reasons stated in the judgment of said court, and the attachment proceedings were vacated and the suit was dismissed (Printed Rec. 50 and 51).

The Central Loan and Trust Company took the case to the Supreme Court of the Terrritory of Oklahoma, on a writ of error (Printed Rec. 1 et seq.), and said Supreme Court held that the reasons given by the trial court for dismissing said cause were erroneous and not well taken, but the suit should have been dismissed upon another and different ground, and the judgment of the lower court was therefore affirmed (Printed Rec. 54 et seq.).

Because of the uncertainity as to the proper practice, the Central Loan and Trust Company, desiring to secure the opinion of this court, has brought the case here by appeal and upon writ of error (Printed Rec. 78 and 87).

STATEMENT OF THE QUESTIONS AT ISSUE AND THEIR ORIGIN.

This cause has never been tried on its merits, but was disposed of, both in the trial court and in the Oklahoma Supreme Court, by summary judgment of dismissal on the ground of the

alleged want of jurisdiction of the District Court of Noble County, Oklahoma Territory. The Campbell Commission Company, on the 16th day of December, 1895, filed, in this cause, in the District Court of Noble County, Oklahoma, what it termed an "amended plea to the jurisdiction" as follows, to-wit :

"Comes now the defendant, the Campbell Commission Company and, entering its appearance to this cause, specially for the purpose of this plea to the jurisdiction of the court, and for such purposes only, moves the court to dismiss this cause for want of jurisdiction of the person of this defendant, and of the subject matter of the action for the following specific reasons, to-wit :

First. Under the organic act of the Territory, the court cannot acquire jurisdiction of the person of this defendant by constructive service by foreign attachment without its consent.

Second. Because there is no basis for service by publication herein, for the reason that all the attachment proceedings are void for want of power in the probate judge to grant the attachment on the plaintiff's demand before the same was due.

Third. Because there has been no seizure of any of defendant's property within the jurisdiction of this court, either by attachment or garnishment process, and reference is hereby made to the answer of A. H. Pierce, garnishee, which said answer discloses the fact that the defendant has and had no interest in the property attempted to be seized and garnisheed in this cause, and—which said—disclosing such facts said plaintiff never joined issue, nor served any notice of taking issue on such answer. Whereby the said answer became and conclusively establishes the fact that none of this defendant's property has been seized as a basis for any pretended constructive service.

Fourth. Because the pretended seizure of said property is void as a basis of jurisdiction, because there was no actual or constructive service of any attachment or garnishment order on this defendant.

Fifth. Because the affidavit for service by publication is wholly insufficient to authorize such service.

Sixth. Because the pretended notice by publication is insufficient because it does not comply with the law and because the same was not published as required by law.

Seventh. Because the pretended order of attachment and garnishment are void for the reason that no undertaking was given by the plaintiff therefore, and because the record discloses that the debt sued upon was not due and all pretended seizures were void under such writs by reason thereof (Printed Rec. 49 and 50).

This plea was an amendment to and stood in the stead of a plea to the jurisdiction filed by said defendant, the Campbell Commission Company, in this cause on the 11th day of November, 1895, and set out on pages 43 and 44 of the printed record.

On the 16th day of December, 1895, being the day on which the amended plea to the jurisdiction was filed, the trial court proceeded to hear the amended plea to the jurisdiction and rendered judgment as follows, to-wit:

"Now, on this 16th day of December, 1895, said cause coming on to be heard on the plea of said defendant, the Campbell Commission Company, to the jurisdiction of the court, and the plaintiff appearing by Messrs. Harris & Lafferty, its attorneys, and the defendant appearing specially by Messrs. Asp, Shartel & Cottingham, its attorneys, and thereupon the plaintiff objected to the consideration of said motion because the same is filed after the time specified in the publication notice for answer, and that said defendant denied any interest in the attached property, and that said motion is not sufficient in form and substance to raise any question for the consideration of this court; which objection is by the court overruled; to which ruling the plaintiff duly excepted, and thereupon the defendant, by leave of court, filed an amended plea to the jurisdiction by adding and substituting the following ground, to-wit: "Second. Because there is no basis for service by publication herein, for the reason that

all the attachment proceedings are void for want of power in the probate judge to grant the attachment on the plaintiff's demand before the same was due;" and thereupon the said plea and motion was duly argued by counsel for the parties, and the court, being fully advised in the premises, overrules the said motion upon the following grounds stated in said amended motion, to-wit: first, third, fourth, fifth, sixth and seventh; to which said ruling of the court overruling the said motion upon said grounds stated in the said amended plea to the jurisdiction, the said defendant duly excepted and excepts."

"And the court, after hearing the argument of counsel, and being further duly advised in the premises, sustains said motion and plea upon the second ground stated in said amended motion and plea, to-wit: "Because there is no basis for service by publication herein for the reason that all the attachment proceedings are void for want of power of the probate judge to grant the attachment on the plaintiff's demand before the same was due."

"The court holding, as a matter of law, that the act of the Territory Assembly of the Territory of Oklahoma, attempting to confer power upon the probate judge to grant attachments upon debts before due, upon absence of the district judge from said court, is unconstitutional and void.

"And it is, therefore, by the court considered, ordered and adjudged that the said plea to the jurisdiction be and the same is hereby sustained upon the second ground therein stated as aforesaid and is overruled on each and all of the other grounds stated in said plea; to which ruling, overruling said plea to the jurisdiction of the court in part, the said defendant duly excepted and excepts, and to which said ruling, sustaining said plea to the jurisdiction upon the second ground, the said plaintiff duly excepted and excepts.

"It is, therefore, by the court considered, ordered and adjudged that the attachment proceedings in this matter are null and void, and of no effect, and that the same are hereby dis-

charged, vacated and held for naught; to which the said plaintiff duly excepted and excepts.

"And it is further considered, ordered and adjuged that, by reason of the nullity of the said attachment proceedings, the attempted service by publication in this matter upon the defendant, the Campbell Commission Company, is null and void and of no effect, and the court has no jurisdiction to hear and determine this cause; to which the plaintiff duly excepted and excepts.

"And it is, therefore, by the court considered, ordered and adjudged that this action be and the same is hereby dismissed for want of jurisdiction without prejudice as to the defendant, the Campbell Commission Company, and that the plaintiff pay the cost in this action, taxed at $———.

"Hereof, let execution issue; to which said order vacating and discharging said attachment, the said plaintiff duly excepted and excepts, and to which said order dismissing said cause at the cost of said plaintiff, for want of jurisdiction, the said plaintiff also duly excepted and excepts" (Printed Rec. 50 and 51).

The cause was then taken by writ of error to the Supreme Court of Oklahoma Territory, and that court, in its opinion which is set out in the printed record on pages 54 to 64, holds: First. That the trial court erred in holding unconstitutional and void the act of the Territorial Assembly of the Territory of Oklahoma, conferring power upon probate judges of that territory to grant attachments upon debts not due, in the absence from the county of the district judge, and that the attachment in this case was granted in a legal and constitutional manner and by one having due authority. Second. That there had been no personal service of summons upon the Campbell Commission Company, within Oklahoma Territory, and said Company was not resident within said Territory, and the court was without jurisdiction of the person of said defendant Company, and that it appeared from an answer in garnishment, filed by a garnisher, one A. H. Pierce, as entertained in the record, that the said defendant was not the owner

of the attached property, for which reason the court had no jurisdiction of such property, and that the court, having no jurisdiction of either the person of the defendant or of the attached property, could proceed no further (Printed Rec. 62, 63 and 64).

The Territorial Supreme Court, having announced its views upon the facts and law of the case, affirmed the judgement of the trial court (Printed Rec. 64).

STATEMENT OF FACTS MATERIAL TO THE ISSUES OF LAW.

The petition alleges that the said defendant Commission Company is a Missouri corporation (Printed Rec. 6), and the affidavit for attachment alleges that said defendant is a foreign corporation, organized under the laws of the State of Missouri (Printed Rec. 7).

Summons for the defendant, the Campbell Commission Company, issued out of the trial court, July 2nd, 1895, the day this suit was filed, and was returned July 12th, 1895, not served, the said defendant not having been found (Printed Rec. 10).

On July 29th, 1895, the plaintiff, the Central Loan and Trust Company, filed its affidavit for publication of summons, alleging therein that said defendant Commission Company was a foreign corporation, having within the Territory no officer or agent upon whom service of summons could be had, and that, after due diligence, plaintiff had been unable to make service of summons on defendant (Printed Rec. 14 and 15).

Service was had by publication of notice, and, in this manner alone, defendant was notified to answer plaintiff's petition on or before September 13th, 1895 (Printed Rec. 15 and 16).

The only pleadings filed by the Campbell Commission Company, defendant, were its plea and amended plea to the jurisdiction (Printed Rec. 43 and 49).

At the same time with the filing of its petition, the Central

Loan and Trust Company, plaintiff, filed its affidavit for attachment (Printed Rec. 7), and its application to the probate judge for an order granting a writ of attachment (Printed Rec. 8), and on the same day said probate judge ordered that an attachment be granted (Printed Rec. 8) and the writ of attachment was issued (Printed Rec. 11).

This writ of attachment was placed in the hands of the sheriff of Noble County, July 3rd, 1895, and on the same day said sheriff levied said writ upon five thousand head of cattle, of the appraised value of twenty-five dollars per head, which were found in Noble County and were taken by virtue of said writ as the property of the defendant, the Campbell Commission Company (Printed Rec. 11 and 12).

On the 6th of July, 1895, the Central Loan and Trust Company, plaintiff, filed in the trial court its affidavit for garnishment (Printed Rec. 13), and on the same day a summons in garnishment issued to one A. H. Pierce, as garnishee, and was served upon him and returned to and filed in the trial court. This summons required the garnishee to answer on or before August 26th, 1895, whether he was indebted to, or had in his possession or under his control any property belonging to the defendant, the Campbell Commission Company (Printed Rec. 13 and 14).

On the 26th of August, 1895, the garnishee, Pierce, filed his answer in garnishment (Printed Rec. 19 to 23) in which he denied all indebtedness to the said defendant, the Campbell Commission Company, and averred that he had in his possession no property, real or personal, belonging to said defendant, and that he was in no manner liable as garnishee. Having thus fully answered the writ, he "for further and special answer" set forth a copy of a written contract which, he alleged, had been entered into on the 8th of September, 1894, by himself on the one part, and the defendant, the Campbell Commission Company, on the other. The contract, as set forth in the answer of said garnishee, is as follows, to-wit:

"It is distinctly understood and agreed by the parties hereto that the title of said steers shall be and remain in the party

of the first part, until the sum of fifteen dollars per head is fully paid by the party of the second part to the party of the first part, for each and every steer delivered on board the cars at Pierce Station, Texas, for shipment to the party of the second part. This amount of fifteen dollars per head is to be paid for each steer so delivered net to the party of the first part, the freight and all other expenses to be paid by the party of the second part, in addition to the sum of fifteen dollars per head.

"It is further agreed and understood by the parties hereto, that the party of the first part may put a man with said steers as his agent, in the pasture of the second party, to represent his interest in said steers; said man to be paid fifty dollars per month by the said party of the second part, from the date of shipment of said steers from Pierce Station, Texas, until said steers shall have been shipped to market or fully paid for, and also furnish him horses to ride and board and lodge him free of cost to the party of the first part, during his stay with said steers. Said man is to look exclusively after said herd of cattle, and to obey the instructions of the party of the second part. The sum of five thousand dollars is hereby paid by the party of the second part, the receipt whereof is hereby acknowledged by the party of the first part at the signing of this agreement, as part of the purchase price.

"The party of the second part agrees to pay the party of the first part interest at the rate of 10 per cent. per annum on all unpaid amounts, from the date of the shipment of said cattle from Pierce Station, Texas, until full and final payments are made in accordance with this agreement.

"It is further understood and agreed that the party of the second part has the right to select from these above mentioned steers ten or twelve hundred, for the purpose of feeding the same on or before November 1st, 1894, which are to be fed in the Holt pasture at Matagorda County, Texas; and when they were ready for shipment, the party of the second part is to pay to the party of the first part the amount of fifteen dollars per head before they are put on board the cars for shipment.

"It is understood that the cattle are to be delivered for the purpose of feeding, and are to be branded at the time of delivery, with the letter "C," and that said party of the second part is to furnish branding irons, the party of the first part to do the branding.

"This contract, signed in duplicate, this 8th day of September, 1894, at Kansas City, Mo.

"*Attest:* "A. H. PIERCE.

"WM. ALBRITAIN, "CAMPBELL COMMISSION CO.,

"HENRY WITHERS, By "JAMES H. CAMPBELL, PRES."

(Printed Rec. 19 to 21).

After setting out the contract as above, the answer of said garnishee, Pierce, alleged the delivery of said cattle on board cars at Pierce Station, Texas, and their shipment, under said cantract, to the pasture of the defendant Commission Company in the Indian Territory, and that there were in said pasture about 5,000 head of cattle covered by said contract when this suit was filed, and when summons in garnishment was served on said garnishee, and that plaintiff had "endeavored to levy its said attachment and garnishment on said five thousand head," and that said 5,000 head of cattle were at the time of filing said answer, and always had been in garnishee's possession. That at the time of the execution of said contract, the Campbell Commission Company paid garnishee five thousand dollars, as required by the terms of said contract, but that the balance of the purchase money for said steers was wholly unpaid, and garnishee had been compelled to pay expenses on said cattle, "aggregating about the sum of ———dollars," because of the failure of the defendant Commission Company to pay the same, as by the terms of said contract it should have done (Printed Rec. 21 and 22).

That 2,000 of said 7,000 steers were fed in pastures in Texas, and were marketed and sold, and after sale about $1,400.00 remained owing to garnishee on their purchase price, upon which it was agreed between garnishee and defendant Commission Company that said sum of $1,400.00 should be a

charge against the 5,000 steers in the Indian Territory, and title to said 5,000 steers should not pass from garnishee to defendant until garnishee had been paid all the amounts owing him as aforesaid (Printed Rec. 22).

Garnishee further avers that before July 6th, 1895, he received notice of the assignment of said contract by the defendant Commission Company to one T. A. Stoddard, as trustee for sundry creditors of said defendant, but garnishee does not attempt to state when said assignment was made. That on July 12th, 1895, the United States Circuit Court for the Western Division of the Western District of Missouri appointed George E. Black and George A. Neal, joint receivers of the defendant Commission Company, and all the assets and property of said Company were placed in the hands of said receivers (Printed Rec. 22 and 23).

This answer in garnishment was not controverted by plaintiff, nor was any notice given the garnishee by the plaintiff that plaintiff had elected to take issue with garnishee upon the answer of the latter.

On the same day on which his answer in garnishment was filed, to-wit: On said 26th of August, 1895, said A. H. Pierce filed his interplea in this suit in the trial court claiming that plaintiff had seized and taken from him 5,000 head of cattle, and that he was then entitled to the immediate possession of the cattle which had been seized and were being held by the sheriff under plaintiff's writ of attachment, and that said cattle were being wrongfully withheld from him, but said Pierce does not in said interplea state that he owns said cattle and his said interplea, which is sworn to, says that said cattle have been taken from him, and, to this extent, contradicts his own answer in garnishment (Printed Rec. 16 and 17).

On the 25th of November, 1895, the plaintiff, the Central Loan and Trust Company, filed its answer to the said interplea of said A. H. Pierce, denying all the alligetions of said interplea, and alleging that said Pierce had waived and abandoned all his interest and claim in the cattle taken under plaintiff's attachment, except such as he held as receiver

under appointment from the trial court, as is herewith fully set forth (Printed Rec. 47).

On September 7th, 1895, the Central Loan and Trust Company, plaintiff, filed in the trial court its application for the appointment of a receiver to take charge of and hold the attached property and to sell the same (Printed Rec. 24 and 25), and, on the 9th of September, 1895, the trial court appointed A. H. Pierce, who had filed the before mentioned answer in garnishment and interplea, receiver without bond of said attached cattle, and ordered him to sell the same in accordance with the terms of his said contract with the said defendant, the Campbell Commission Company, and out of the proceeds to pay himself the amount owing him on the said contract, and to hold the balance subject to the further orders of the court (Printed Rec. 27 and 28).

On the 13th of September, 1895, said Pierce filed a written acceptance of the office of receiver under the appointment of the court, and took the oath of office and qualified as receiver (Printed Rec. 29), and on the 14th of September, 1895, he received the attached cattle and receipted the sheriff for the same (Printed Rec. 38), and afterwards filed in court his report as receiver showing he had sold said cattle, and out of the proceeds had paid all expenses of holding and selling the same, and had retained all sums coming to him under his said contract and agreement with the defendant Commission Company, and that after deducting said expenses and the amount paid to himself, he had a balance left in his hands of $22,-361.64, which was the net proceeds of the cattle, after the payment of all expenses and of all sums owing the said Pierce by said defendant, the Campbell Commission Company, and which balance he, the said Pierce, held as receiver, subject to the orders of the trial court in this cause (Printed Rec. pages 38 to 42. See page 42 for balance on hand). The claim made by Pierce in his answer in garnishment had been settled and extinguished in this manner, and said balance of $22,-361.64 remained in the hands of the receiver subject to plaintiff's attachment and to the claims of the interpleaders other

than Pierce, and was in the hands of said receiver when the cause was dismissed by the trial court, and when this judgment was, on a different ground, affirmed by the Territorial Supreme Court, and the said receiver still holds said balance.

On the 21st of September, 1895, one T. A. Stoddard filed an interplea in said cause, and after setting out the contract between the garnishee and receiver, Pierce, and the defendant, the Campbell Commission Company, as the same had before that time been set out by said Pierce in his answer in garnishment, and as said contract is copied in this brief, alleges that Geo. W. Miller and J. C. Miller, partners doing business under the same firm name, Geo, W. Miller & Son, were indebted to the defendant, the Campbell Commission Company, in a large sum of money, and procured said Commission Company to make said contract with said Pierce for the use and benefit of said Miller & Son. That in order to secure said defendant Commission Company in the payment to it, out of the anticipated profits on said contract, of the amount owing it by said Miller & Son, and of amounts needed to carry out said contract and to pasture and market said cattle, which latter amounts defendant was to secure and borrow for said Miller & Son, said contract was taken in the defendant's name. That the defendant Commission Company became indebted to the sundry persons and corporation for whom the interpleader, Stoddard, was acting as trustee, and that said debts were for the benefit of said Miller & Son, or were secured by collateral notes of said Miller & Son payable to said defendant Commission Company. That on July 1st, 1895, and before the filing of this suit, the defendant Commission Company assigned to said Stoddard, as trusteee for said creditors of said defendant, all its interest in its said contract with said Pierce. That Pierce, as receiver, had sold said cattle and had a large balance of proceeds remaining in his hands, which money said Stoddard claimed to own as trustee (Printed Rec. 31 to 38).

On November 25th, 1895, George W. Miller and J. C. Miller, partners composing the firm of George W. Miller &

Son, filed their interplea in this cause, alleging that said contract was made for their sole benefit, and that the Campbell Commission Company had no interest therein, and had executed a transfer of said contract to one T. A. Stoddard, as trustee, without any right or authority whatever. That Miller & Son were the sole owners of the attached cattle and of the proceeds of the same in the hands of Pierce, as receiver. The prayer of the interplea is that Miller & Son have judgment for the proceeds of said attached cattle, after the payment of the claim of said Pierce and of the expenses of the receiver and costs of court (Printed Rec. 44 to 46).

With the record in this condition, the defendant, the Campbell Commission Company, filed its "amended plea to the jurisdiction," a copy of which is to be found on pages 4 and 5 of this brief, and on the day on which it was filed, December 16th, 1895, the trial court took up this "amended plea" and sustained the same on the second ground, which complains that the act of the territorial legislature, granting power to a probate judge to order an attachment in the absence of the proper district judge, is unconstitutional and void, and that since the attachment in this case was granted or ordered by a probate judge, it must, therefore, be vacated, and as there was no personal service of process and no property had been legally seized, the court was without jurisdiction, and the suit must be dismissed. A copy or the order of the trial court dismissing the cause and vacating plaintiff's attachment is printed on pages 5 to 7 of this brief.

Defendant's "plea to the jurisdiction" is substantially a motion to dismiss. Six grounds or reasons are assigned in support of the pleading. The trial court sustained the second ground of this motion, the substance of which is as stated above, and overruled all other of the grounds of the motion or plea, including the third. The Supreme Court of the Territory overruled the second ground of the motion but sustained the motion on the third ground.

The third ground of the plea or motion is that it appears, from the answer in garnishment of the garnishee, A. H. Pierce,

"that the defendant had and has no interest in the property attempted to be seized and garnisheed in this case," and plaintiff, having failed to join issue with said answer, the same conclusively establishes the fact that none of defendant's property has been attached (Supra, p. 4).

The part of the opinion of the Supreme Court of the Territory which sustains the third ground of the defendant's "plea to the jurisdiction," reads as follows, to-wit:

"The conclusion we have reached on this point necessitates our consideration of the other proposition presented in defendant in error's special plea to the jurisdiction of the district court, viz., that said court had no jurisdiction because no actual service had been had upon the defendant, and because there had been no seizure of any of defendant's property within the jurisdiction of the court, either by attachment or garnishment process. The record shows that there was no personal service on defendant. The answer of the garnishee showed that the property seized under the writ of attachment issued was in the possession of the garnishee and held by him under a vendor's lien; that by the terms of the contract creating such lien, title to the property was not to pass to the defendant, but was to remain in the garnishee until the terms of said contract had been complied with by the defendant; that defendant at the time of the service of the garnishment had no interest whatever in said property, having transferred and assigned whatever interest he might have had, by virtue of said contract, to one Stoddard, in trust, and to be applied in the payment of certain of his debts, amounting to more than any interest which he might have had in said property. Section 4085, Statutes of Oklahoma, 1893, provides:

"The answer of the garnishee shall in all cases be conclusive of the truth of the facts therein stated, unless the plaintiff shall, within twenty days, serve upon the garnishee a notice in writing that he elects to take issue on his answer, in which case the issue shall stand for trial as civil action, in which case the affidavit on the part of the plaintiff shall be

deemed the petition, and the garnishee's affidavit the answer thereto."

No notice having been given to the garnishee by the plaintiff of his intention to take issue on the garnishee's answer, in this cause filed, and no issue having been made thereon under the foregoing provision of the statute, such answer must be taken as conclusive of the truth of all the facts stated therein, and such answer must be held as conclusively showing that the defendant did not own and had no interest in the property attached, and that no debts or liabilities were owing to him by such garnishee, and that whatever interest he might have had in such property had, before the garnishment, been lawfully assigned and conveyed to Stoddard. Was there, then, any constructive service against the defendant in the cause by attachment or garnishment? A garnishment, to have any force or effect, must reach and bind some property of the defendant or some debt due to him. Where property is sold and delivered upon condition that the title shall not vest in the vendee unless the price agreed upon be paid within a specified time, the vendee has no attachable interests in the property until the performance of the condition.

Drake on Attachment, section 246.
Buckmaster vs. Smith, 22 Vt., 203.
McFarland vs. Farmer, 42 N. H., 386.
19 Federal Reporter, 760.
Lucas vs. Birdsey, 41 Conn., 357.
Bradshaw vs. Warner, 54 Ind., 58.
Freeman on Judgments, Sec. 124.
Strong vs. Taylor, 15 N. Y. (Hill), 325.
Sage vs. Sleutz, 23 Ohio St., 1.
Cardinal vs. Edwards, 5 Nev., 40.
Harkness vs. Russell, 118 U. S., 671.

Where completion of contract is a condition precedent to payment the payor is not garnishable on his debt before the contract is completed (Carley vs. Bertran, garnishee, 34 N. W., 674). An answer showing that the debtor has assigned to a third party his interest in the property or in the debt due

from the garnishee, and has notified the garnishee, sets up a state of facts showing that the garnishee is under no legal liability to the debtor (Bailey vs. Union Pacific R'y. Co., garnishee, 17 N. W., 567).

The contention of plaintiff in error, that the defendant in error's plea to the jurisdiction in the court below, was a general appearance of the defendant in action and gave jurisdiction, cannot be sustained. In order to constitute a general appearance the defendant must file some plea which in effect admits the jurisdiction of the court. The plea in this cause did not go to the merits of plaintiff's cause of action or his right to sue thereon, but was simply an assertion that the defendant was not in court, and that the court held no jurisdiction of his person or his property, because there had been no service of process, either upon him personally or so as to affect any property owned by him.

We must therefore conclude that, when the answer of the garnishee was filed, and the same was not traversed within the time provided for by law, such answer was conclusive as to the facts therein stated, namely, that no property belonging to the defendant in error or debts due to him was reached by such garnishment, and as no other property of the defendant was seized under the attachment and there was no personal service upon the defendant, the court had acquired no jurisdiction and was without jurisdiction to proceed further; that all the subsequent proceedings, orders and decrees therein, except the order dismissing said cause, were *coram non judice* and void. As the court below entered a final order dismissing the cause was (for?) want of jurisdiction, although not upon grounds herein approved, the judgment below was for the right party and said judgment is affirmed (Printed Rec. 62 to 64).

Thereupon the Central Loan and Trust Company moved a rehearing (Printed Rec. 65 et seq.), and this having been refused on the 14th of June, 1897 (Printed Rec. 76), the cause was brought to this court by appeal and writ or error.

ASSIGNMENT AND SPECIFICATIONS OF ERROR.

The Central Loan and Trust Company has filed assignments of error both on appeal and on writ of error, and the assignments in the one case are identical with those in the other. Only such assignments will be printed in this brief as are relied upon, and all assignments not printed are to be taken as having been waived and abandoned.

The assignments of error relied upon are as follows, to-wit:

Third. The court erred in considering the question of the jurisdiction of the trial court over the property of the defendant in error or the ownership of the property attached in the proceeding, when the same was not assigned as error or in any manner presented to the court for consideration or determination.

Fourth. The court erred in holding that the motion of defendant in error to set aside the attachment for the want of jurisdiction over the property of the defendant could be considered as an attack upon the service by publication.

Fifth. The court erred in holding that the affidavit of the garnishee could be considered as evidence, showing conclusively that the property attached was not the property of the defendant in error.

Sixth. The court erred in holding that the answer of the garnishee could be considered for any purpose other than as showing his liability or non-liability to the defendant in error at the time of the service of garnishment summons upon the garnishee.

Seventh. The court erred in considering the claim and contention of defendant in error that it was not the owner of the property attached.

Eighth. The court erred in considering defendant in error's plea to the jurisdiction of the district dourt, set out in the following language: "That said court had no jurisdiction, because no actual service had been made upon the defendant, and because there had been no seizure of any of defendant's property within the jurisdiction of the court, either by atiach-

ment or garnishment process," said quession and proposition not being presented to the court in the brief or argument, or assigned as error.

Ninth. The court erred in holding that in the absence of notice in writing of plaintiff in error's election to take issue on the answer of the garnishee, the garnishee's answer became conclusive "of the truth of all facts stated therein," and that "such answer must be held as conclusively showing that the defendant did not own and had no interest in the property attached," and, in the same connection, the court erred in holding "that when the answer of the garnishee was filed, and the same was not traversed within the time provided by law, such answer was conclusive as to the facts therein stated, viz.: 'that no property belonging to the defendant in error had been attached.' "

Tenth. The court erred in ignoring the return of the sheriff showing that he had attached the property of the defendant, and in ignoring the further proceedings in the cause showing that the property had been sold as the property of the defendant, and that the proceeds were then in the hands of the receiver appointed by the court to abide the determination of the court in the case.

Eleventh. The court erred in considering the answer of the garnishee, with reference to the ownership of the property, as sufficiently establishing the fact of ownership, and overthrowing the return of the officer upon the writ of attachment.

Twelfth. The court erred in ignoring the fact that the garnishee, who had interpleaded in the action, charged under oath that the property had been seized by the sheriff and taken out of his possession, and the further fact that the garnishee, after filing said interplea, abandoned all claim to the property and accepted the appointment as receiver for the court.

Thirteenth. The court erred in disposing of the rights of the plaintiff in error, as well as Stoddard, Miller & Son, and A. H. Pierce, interpleaders, on the *ex parte* statement of the garnishee as to the ownership of the property in litigation.

Fourteenth. The court erred in holding the answer of the

garnishee sufficient to affect and determine the rights of the plaintiff in error and the intervenor in the action, and sufficient to deny such parties the right of trial by jury of the question of ownership of the property in litigation.

Sixteenth. The court erred in holding that the construction which was placed upon the contract, set out in the garnishee's answer by the garnishee himself, was binding upon the court as the proper construction of the contract, and in not referring to and considering the contract itself in determining its real meaning and legal force and effect.

Seventeenth. The court erred in holding that the contract set out in the answer of the garnishee created a vendor's lien upon the property in favor of the garnishee and was at the time by its terms a conditional sale of the property by which title was not to pass to the defendant, but was to remain in the garnishee.

Eighteenth. The court erred in holding that the contract set out in the answer of the garnishee had any greater force or effect than a chattel mortgage or lien to secure the payment of the purchase price of the property therein described.

Nineteenth. The court erred in holding that the answer of the garnishee could be considered as establishing the ownership of the property in himself after he had abandoned and waived his claim of owneship and possession.

Twentieth. The court erred in holding that the contract between the garnishee and the defendant in error, set forth in the answer of the garnishee, was an executory contract of sale by which no title to or interest in the property passed to the defendant in error, at the same time holding that the rights and interests of the defendant in error in the same property had been assigned to Stoddard, by reason of which there was no liability of the garnishee to the defendant in error.

Twenty-first. The court erred in holding that the defendant could assail the validity of the attachment on the ground that it was not the owner of the property attached.

Twenty-second. The court erred in sustaining the indirect attack of the defendant in error upon the attachment on the

ground that it was not the owner of the property, by considering the attack as one directed to the service, the sufficiency of which depended upon the attachment (Printed Rec. 79 to 81 and 87 to 89).

BRIEF AND ARGUMENT.

Section 4120 of the Oklahoma Statutes of 1893, relating to civil procedure, under which plaintiff's action in this cause was brought, provides that, under certain circumstances, an action may be filed on a claim before the claim is due and an attachment may be issued against the property of the defendant. The section reads as follows, to-wit:

"Section 4120. Where a debtor has sold, conveyed or otherwise disposed of his property with fraudulent intent to cheat or defraud his creditors, or to hinder or delay them in the collection of their debts or is about to make such sale or conveyance or disposition of his property, with such fraudulent intent, or is about to remove his property, or a material part thereof, with the intent or to the effect of cheating or defrauding his creditors or of hindering or delaying them in the collection of their debts, a creditor may bring an action on his claim before it is due and have an attachment against the property of the debtor."

Section 4120 of said statutes provides how an attachment may issue in an action on a claim which is not yet due, and, among other things, provides that in the absence of the district judge an order of attachment on such a claim may be granted by the probate judge in the county in which the action is brought. Plaintiff's action was filed in Noble County, Oklahoma Territory, and, the district judge of that county being absent, application was made to the probate judge who issued the order of attachment (Supra p. 2). Section 4121 reads as follows, to-wit;

Section 4121. The attachment authorized by the last section may be granted by the court in which the action is

brought, or by the judge thereof, or in his absence from the county, by the probate judge of the county in which the action is brought; but before such action shall be brought, or such attachment shall be granted, the plaintiff, or his agent or attorney, shall make an oath in writing, showing the nature and amount of the plaintiff's claim, that is just, when the same shall become due, and the existence of some one of the grounds for attachment enumerated in the preceding section.

The provisions vesting the judicial power of the courts of Oklahoma Territory, as the same are contained in the organic act, or act of Congress creating the Territory, are as follows, to-wit:

"That the judicial power of said Territory shall be vested in a supreme court, district courts, probate courts and justices of the peace. The jurisdiction of the several courts herein provided for, both appellate and Original, and that of the probate courts and of the justices,of the peace, shall be as limited by law; *Provided*, that justices of the peace, who shall be elected in such manner as the Legislative Assembly may provide by law, shall not have jurisdiction of any matter in controversy when the title or boundaries of land may be in dispute, or where the debt or sum claimed shall exceed one hundred dollars; and said supreme and district courts, respectively, shall possess chancery as well as common law jurisdiction and authority for redress of all wrongs committed against the constitution or laws of the United States or of the Territory, affecting persons or property. The said supreme and district courts of said Territory and the respective judges thereof shall and may grant writs of mandamus and habeas corpus in all cases authorized by law."

The motion to dismiss of the defendant, the Campbell Commission Company, is set out in this brief (Supra p. 4).

Upon the hearing of said motion, the trial court held that the act of the Territorial Assembly attempting to confer power upon probate judges to grant attachments upon debts not due was unconstitutional and void, and since the attachment in this

suit had been ordered by a probate judge the trial court vacated plaintiff's attachment and dismissed its action,

The Supreme Court of Oklahoma Territory, reviewing the judgment of the trial court, held that the act of the territorial legislature, granting power to probate judges to issue orders of attachment in the cases and under the circumstances stated above, was constitutional, and that the trial court erred in holding the contrary. The Supreme Court then proceeded to consider the third ground assigned by the Campbell Commission Company in support of its motion to dismiss, and held plaintiff's attachment void, because, in its opinion, no property belonging to the defendant in attachment had been seized under said attachment, and, there having been no personal service upon the defendant, the trial court was without jurisdiction to render a personal judgment against the defendant, or to condemn any of its property for the payment of the debt sued upon by plaintiff.

The conclusions reached by the Supreme Court of the Territory, necessarily involve each of the following propositions, to-wit:

1. That where property has been seized under a writ of attachment and the officer executing the writ endorses his return thereon, showing that he has seized certain property belonging to the defendant, and returns the writ so endorsed into court, it is competent for the defendant upon a motion to dismiss, to deny the ownership of the attached property.

2. That where the question of the ownership of attached property is raised by a motion to dismiss, it may be disposed of at the hearing of such motion without the formality of a trial, and without regard to the joinder or non-joinder of issue upon this question by the pleadings of the parties, and without the introduction or consideration of evidence.

3. That the official return on a writ of attachment may be attacked upon a motion to dismiss the action, and that no motion to vacate the return, and no direct attack thereon need be made.

4. That an uncontroverted answer in garnishment is con-

clusive evidence against the plaintiff, not only in the garnishment proceedings but also in the action to which the garnishment is ancillary.

5. That in a motion to dismiss an action where the ground of the motion is that the attached property does not belong to the defendant, an uncontroverted answer in an ancillary garnishment is of greater value as evidence than is the positive oath of the garnishee in the original action, even when combined with the official return upon an executed writ of attachment and reports officially made by the garnishee as receiver of the court.

6. That the question as to the ownership of attached property may be considered in an appellate court, although not assigned as error or in any manner presented for consideration or determination, and although no trial of said issue was had, and no evidence thereon was introduced, and no opportunity for its introduction afforded in the trial court.

In addition to these propositions, there are several others which will be referred to in their proper order, but which do not so apparently arise from the statement of the case heretofore made in this brief. The Central Loan and Trust Company, plaintiff in error and appellant, will attack each one of the propositions hereinbefore set out, and will attempt to show that none of them are well taken. In doing this, appellant and plaintiff in error will first announce a proposition of law which it believes antagonistic to the position necessarily taken by the Supreme Court of the Territory, and this will be followed by a brief statement of the facts necessary to an understanding of the proposition and of its applicability, and this statement will, in its turn, be followed by a list of authorities and, at times, by a short argument,

FIRST PROPOSITION.

Where property has been seized under a writ of attachment, and the officer executing the writ endorses his official return thereon, showing that by virtue of said writ he has seized property belonging to the defendant, and the writ as endorsed has been duly returned into court, it is not competent for the defendant, upon a motion to dismiss the attachment suit, to deny the ownership of the property.

STATEMENT.

This suit was brought by the Central Loan and Trust Company as plaintiff against the Campbell Commission Company as defendant, upon a debt which was not due at the time suit was filed, and under the laws of Oklahoma Territory the suit could be instituted and maintained as an attachment proceeding only, and for the purpose of impounding and holding defendant's property until the maturity of the debt owing to the plaintiff. That this is the meaning and intent of the Oklahoma statutes is made clear by the language of Section 4122 of the statutes of 1893 relating to civil procedure, which reads as follows, to-wit:

"*Section 4122.* If the court or judge refuse to grant an order of attachment, the action shall be dismissed, bnt without prejudice to a future action; and in all such actions, application for an attachment must be made."

Writ of attachment was sued out, issued, placed in the hands of the sheriff of the couty in which the suit was filed, and was by said sheriff levied upon five thousand (5,000) head of cattle which the sheriff states in his official return was the property of the defendant Campbell Commission Company, and which was appraised at twenty-five ($25.00) dollars per head (Printed Rec. 11 and 12). The attachment was levied on the 3rd day of July, 1895, and the property attached remained in the hands of the sheriff until the 7th

day of September, 1895, at which date A. H. Pierce was appointed receiver of said property (Printed Rec. 27 and 28).

Before that time on the 6th of July, 1893, the said A. H. Pierce was summoned as a garnishee in said cause (Printed Rec. 13 and 14), and on the 26th of August, 1895, the said Pierce filed in said court his answer as garnishee, and in this answer stated that he was not indebted to the Campbell Commission Company, and that he had no personal property or effects of said Company in his possession and was in no manner liable as garnishee. The garnishee then proceeded to set out a contract between himself and the Campbell Commission Company, dated September 8th, 1894, (See supra, pages 9 to 11, for copy of same), whereby the said garnishee, Pierce, agreed, within a certain time and at a certain place specified therein, to gather and put on board cars certain steer cattle which the Campbell Commission Company agreed to take charge of at the shipping station, and on board the cars and at its own expense and risk to ship to its pastures in the Indian Territory, and to handle and attend to said cattle until the summer or fall of 1895, at which time it was to ship the steers to market for the account of said Pierce. The contract contained an agreement that the title should remain in Pierce until the cattle had been paid for at the rate of fifteen ($15.00) dollars per head, of which amount the contract acknowledged receipt by Pierce of five thousand ($5,000.00) dollars having been paid at or before its execution and provided that the Campbell Commission Company should pay interest on the balance of the purchase price from the date of the shipment of the cattle at the rate of ten per cent. per annum. The answer in garnishment further stated that seven thousand head of cattle had been delivered under the contract, of which number two thousand head were sold to the Campbell Commission Company, in Wharton County, Texas, and five thousand head had been shipped to the pasture of the Campbell Commission Company in the Indian Territory, and were now and had always been in the possession of the garnishee, Pierce, but plaintiff had endeav-

ored to levy its attachment on said cattle. That the garnishee had never received payment for said five thousand head of cattle except to the extent of the five thousand ($5,000.00) dollars mentioned the contract. That about fourteen hundred ($1,400.00) dollars was owing to the garnishee on said two thousand head of cattle held in Wharton Couty, Texas, and that it had been agreed between garnishee and the Campbell Commission Company that this fourteen hundred ($1,400.00) dollars was to be a charge against the five thousand head of cattle in the Indian Territory. The garnishee further stated in his said answer that, prior to the service of the garnishment summons, he had been notified of a transfer having been made by the Campbell Commission Company, dated July 1st, 1895, transferring its entire interest in said cattle to one T. A. Stoddard as trustee for certain creditors but the answer in garnishment does not aver that this transfer was executed on the day of its date or at any time before the day of plaintiff's attachment. The answer further states that on the 12th day of July, 1893, a receiver of the assets and property of said Campbell Commission Company was appointed by a decree rendered in the United States Circuit Court for the Western Division of the Western District of Missouri, and that said decree remained at the date of the answer in full force and effect. Having stated these facts the garnishee prayed that he be discharged from garnishment, and that he be allowed his expenses and a reasonable attorneys fee for making his answer and defending the action against him as garnishee (Printed Rec. 19 seq.)

This answer in garnishment was filed in court on the 26th day of August, 1895, and on that day the same person, A. H. Pierce, filed an interplea in the original cause (Printed Rec. 16 et seq.), in which he avers that said five thousand head of cattle had been wrongfully taken from him, and were being wrongfully detained from his possession, under and by virtue of plaintiff's writ of attachment, while the answer in garnishment states that said cattle were and always had been in the possession of the said Pierce. This interplea was sworn to on

the 22nd of August, 1895, and the answer in garnishment was sworn to on the 24th of August, 1895, both affidavits having been made before the same officer, and one containing a positive statement that plaintiff had possession of the attached property, and the other a positive statement that the property had been taken away from him under plaintiff's attachment.

Pierce was appointed receiver at plaintiff's application and as the result of an agreement that he should have this means of handling the cattle to the best possible advantage, and of getting out of them the money to which he was entitled under his contract, which Pierce said was all that he cared to claim and all that he wished to get. The order appointing Pierce receiver of said cattle directs him to proceed with the sale of same and retain, out of the moneys received for said cattle, the full amount owing him under the terms of his contract with the defendant, the Campbell Commission Company, as set forth in his answer in garnisnment. The remainder of the proceeds of said cattle, said Pierce was ordered to hold subject to the order of court (Printed Rec. 27 and 28).

Pierce took possession of the cattle and began shipping them to market, and, at some time prior to the hearing of the motion to dismiss, he filed in the court a report showing his actions as receiver (Printed Rec. 38 to 42). This report shows that Pierce had paid all the expenses of handling the cattle, and all the expenses of shipping and selling the same, and had left for himself the full amount which he was entitled to receive on said cattle under his said contract with the Campbell Commission Company, including interest, and that he reported himself as having a balance in hand, and subject to the orders of court, of $22,361,64. The receiver's report shows a statement of the amount owing by the Campbell Commission Company to the said receiver under the said contract, and shows the interest accruing on the same, and shows that the whole of that amount was paid by the receiver, Pierce, to himself (Printed Rec. 39 and 40, and first and second lines of 41). In fact, Pierce took the receivership of the cattle under an agreement, and so that he might control their sale and receive and

keep what was owing him under his contract with the Campbell Commission Company, and, having received that amount, was fully satisfied with the result, and claimed nothing more; but in trying this issue without evidence, there is no record of these facts, save the order apointing Pierce, receiver, his acceptance of that appointment and his report.

AUTHORITIES.

Wade on Attachments, Sec. 289, p. 553.
Langdon vs. Conklin, 10 Ohio St., 439.
Mitchell vs. Skinner, 17 Kan., 563.

ARGUMENT.

Plaintiff's action was brought under Sections 4120, 4121 and 4122 of the Oklahoma Statutes of 1893, relating to civil procedure. Section 4120 provides in effect that if a debtor has sold or disposed of his property with intent to cheat or defraud his creditors, or to hinder or delay them in the collection of their debts, or about to make such fraudulent disposition of his property or to remove the same with the intent of cheating or defrauding his creditors, or hindering or delaying them in the collection of their debts, any creditor may bring an action on his claim against such a debtor before the claim is due and may have an attachment against the property of the debtor. For a copy of this section see page 22 of this brief. Section 4121 provides how an attachment may issue on a claim which is not yet due, and by whom the attachment may be ordered. (Supra p. 22 and 23). Section 4122 provides that in any action on a claim not yet due, if an attachment be refused, the action shall be dismissed, and that in all such action an application for an attachment must be made.

As has already been stated, plaintiff's suit was brought under these provisions of the Oklahoma Statutes. Its claim was not due when suit was filed. It made application for attachment

under the provisions of section 4120 and the attachment was ordered under the provisions of section 4121 by the probate judge of Noble County, Oklahoma, in which county the suit was filed. While the question does not directly arise in the course of this brief, plaintiff's attorneys regard the action as an attachment proceeding purely and as having been brought and as being allowed by the law for the purpose of impounding and holding defendant's property until the maturity of the debt owing to the plaintiff.

Now it follows that this action, being strictly an attachment proceeding, it has no standing in court and must be dismissed if the probate judge had no authority to grant an order of attachment, for in such case, plaintiff's attachment having been granted by the probate judge, and the probate judge being without authority, the attachment is and was a nullity and should have been dismissed, and this having been done, and the plaintiff being there in court without an attachment, the provisions of Section 4122 at once come into operation and plaintiff's action must be dismissed, unless, indeed, he may have the right to make a new application for an order of attachment to the district judge and to proceed under a new attachment.

But no such result as the dismissal of the suit necessarily follows a finding of the court, in advance of the maturity of plaintiff's debt, that up to the time of such finding plaintiff has failed to seize any of defendant's property, for plaintiff is in court with a writ of attachment properly granted and is entitled, upon demand, to have alias writs to the sheriffs of different counties, and, upon affidavit, may have writs of garnishment to sundry garnishees and plaintiff having complied with the law, and having applied for an attachment, and the cause not having been refused, has the right to have his action stand until the maturity of his debt, and, in the meantime, to use as best he can the process which the law has given him for his protection. Consequently, a motion to dismiss, because the only property attached at the time of the hearing of the motion does not belong to the defendant, should have been

overruled, regardless of the truth or falsity of the ground alleged, which is not sufficient to support the motion, and, if true, can require no such relief as was sought by the defendant,

If it is true that property has been attached which does not belong to the defendant, the only remedies are, first, if the owner has intervened and claimed the property, to adjudge it to him on final trial with damages for its detention, if any have been suffered; or, second, if the owner does not chose to claim the property, then to relegate him to his action for damages, and to proceed to condemn the property as if it did belong to the defendant. In no case does the seizure of property not belonging to the defendant do the defendant any injury or entitle him to any relief. Therefore, the courts have decided, and the text writers have laid it down as a rule, that it is not competent for a defendant to move to vacate an attachment on the ground that he does not own the property attached under the writ.

But the defendant may say in reply: "I do not ask to have the attachment vacated. I ask to have the court hold that there is no basis for constructive service."

The materiality of the distinction has no existence outside of the imagination of defendant's attorneys. The trial court overruled this ground; the Supreme Court of the Territory, preferring to sustain it, disregards the distinction attempted to be made by defendant's attorneys and dismisses, not because of any defect in the service in the case, but because it says the trial court has within its jurisdiction no property which it can condemn for plaintiff's debt.

But returning to plaintiff's motion: Constructive service is a creature of statute law, and the basis of constructive service in Oklahoma Territory is an affidavit, the terms of which are prescribed by Section 3951 of the Statutes of 1893, relating to civil procedure. Section 3950 of said Statutes provides that service by publication may be made in certain cases, one of which is "in actions brought against a non-resident of the Territory or a foreign corporation having in the Terri-

tory property or debts owing them, sought to be taken away by any of the provisional remedies or to be appropriated in any way." Section 3951 requires an affidavit to be made, showing that service of summons cannot be made, and that the case comes within the provisions of Section 3950, and provides that "when such affidavit is filed, the party may proceed to make service by publication." It is plain that the affidavit is the basis, and the only basis of constructive service by publication in Oklahoma Territory and the statutes of the Territory make no provision for contesting this affidavit, or for setting aside the service should any of the statements made in the affidavit appear to be false.

The trial court adjudged the attachment proceedings null and void, and, in express terms, vacated such proceedings, and, this having been done, it proceeded, from this judgment as a basis and foundation, to the conclusion that the suit should be dismissed. Very plainly, the trial court regarded and treated the defendant's motion as one which could not be granted without first vacating the attachment, and as being to all intents and purposes a motion to that end. Yet the authorities are all one way in holding that a defendant cannot assign it as an objection to an attachment that property has been taken, under, the writ which does not belong to the defendant.

The Supreme Court of the Territory affirms the judgment dismissing this suit, because, it says, the attached property cannot, be held under the attachment, but must be released. This is nothing else than a judgment vacating the attachment, and it is not possible to sustain defendant's motion to dismiss upon the third ground urged in support thereof without first vacating plaintiff's attachment and releasing the attached property.

SECOND PROPOSITION.

That where the question of ownership of attached property becomes material in the progress of an attachment suit, the issue must be raised upon the pleadings, and the question must be tried in due course and in the same manner as are other issues of fact.

STATEMENT.

The question of the ownership of the property held under attachment by plaintiff was raised between plaintiff and A. H. Pierce, by the interplea filed by the said Pierce, and the answer made thereto by the plaintiff, the Certral Loan and Trust Company. The effect of the interplea of A. H. Pierce has already been fully stated. In this plea, he alleged that five thousand head of steer cattle had been wrongfully taken from him and were being wrongfully detained by the Central Loan and Trust Company, acting by and through the sheriff. He prayed for a judgment for the return of said cattle, and for damages for their seizure and detention (Printed Rec. 16 and 17). The Central Loan and Trust Company answered said interplea by a general denial and by a special allegation that the said Pierce had waived and abandoned all his interests and claim in and to the cattle, except what he held by virtue of his appointment as receiver in this suit and by virtue of his acceptance of said appointment (Printed Rec. 70).

On the 21st of September, 1895, T. A. Stoddard intervened in this cause, by filing his interplea in which he claimed that he was the owner of the attached cattle, and asked that the proceeds remaining in the hands of the receiver, after the sale of the cattle, and after the payment of expenses and of the amount retained by the receiver, Pierce, as hereinbefore stated, on his contract with the defendant, the Campbell Commission Company, be paid over to him, the said Stoddard (Printed Rec. 31 et seq.).

On the 25th of November, 1895, G. W. and J. C. Miller

intervened in this cause, and filed their interplea wherein they claimed to be the owners of the attached cattle, and prayed that the balance of the proceeds remaining in the receiver's hands be turned over to them (Printed Rec. 44 et seq).

These three interpleas present the issues as to the ownership of the attached cattle. It is true that the Pierce interplea, as shown by his report as receiver, has been abandoned, but Stoddard and Miller Bros., each asserted ownership of the attached property, and the plaintiff asserted that said property belonged to the defendant, the Campbell Commission Company. These issues, the plaintiff claims, should have been treated in due course, and in the same manner, and with the same right of jury and to introduce testimony, as in the case of any other issue between the parties to a suit.

The Campbell Commission Company moved to dismiss this cause, because, among other thing's there had been no seizure of any of the defendant's property within the jurisdiction of the trial court, either by attachment or garnishment process, and in support of this ground of its motion it referred to the answer in garnishment of the said A. H. Pierce (Printed Rec. 49). The trial court heard this motion upon the face of the record, and took no testimony, and permitted the introduction of none, and decided this particular ground adversely to the motion (Printed Rec. 50 and 51). The Supreme Court of the Territory also decided the case upon said motion to dismiss, and as no trial of the issue was had in the lower court, so necessarily no trial was had in the Supreme Court, and the motion was decided upon the face of the record, and the case was dismissed on an issue of fact, tried without evidence and without the intervention of a jury.

AUTHORITIES.

Under this proposition, plaintiff contends that an issue as to the ownership of attached property, arising in the course of an attachment proceeding, must be treated like other issues in a case, and must be tried upon the pleadings between the parties who are entitled to raise the issue, and an opportunity must be given for the introduction of evidence and for the intervention of a jury to pass upon the questions of fact. It requires no imagination to see what injustice may be done and what evils may grow out of such a summary hearing, as was permitted in this case, of the issue as to the ownership of the cattle which had been subjected to plaintiff's writ of attachment.

By the letter of the law the answer of the garnishee Pierce, not having been controverted within the statutory period, was to be taken as true. But suppose it to have been the case that after the filing of said answer the garnishee came to the plaintiff an exhibited his cattle contract with the Commission Company, and stated that he desired nothing more than the amount of money to which he was entitled under said contract, and it was then agreed between the plaintiff and the garnishee that the garnishee should be appointed receiver, if the trial court consented, and should sell the cattle and keep the money until he was himself fully paid, and, if the proceeds of the cattle were not sufficient, then that the plaintiff in attachment should pay to the garnishee any loss he might suffer, while, if such proceeds were more than sufficient, the balance remaining after the payment of the garnishee should be held subject to the order of the court, and that, pursuant to said agreement, the plaintiff refrained from controverting the answer of the garnishee, and asked to have the garnishee appointed receiver, and said appointment was made, and this verbal agreement was in all respects carried out. If, afterward, the garnishee insisted upon holding the entire fund, and insisted that he should have judgment on his answer, is it not probable that the plaintiff would have been permitted to

controvert the answer, even though the statutory period had long before expired? Any number of situations will at once present themselves to the mind, in which the effect of the statute, limiting the period for giving notice of the intention of the plaintiff to controvert the answer of the garnishee, would be disregarded by the court, and plaintiff would be permitted, after the expiration of the period, to take issue upon the answer. By the sort of proceeding which has been indulged in, in this case in the Supreme Court of the Territory, all inquiry into the merits has been avoided and the plaintiff, without having had its day in court, is compelled to suffer the loss of the debt sued upon, notwithstanding it had used all possible diligence toward obtaining security.

THIRD PROPOSITION.

The official return of the sheriff of Noble County endosred on the writ of attachment in this case showed that the property which had been seized under such writ of attachment was the property of the Campbell Commission Company, and as between the parties to the writ, that, is as between the plaintiff who sued out the writ, and the defendant against whow it ran, the official return imparted absolute verity and could not be attacked on a motion to dismiss.

STATEMENT.

The official return upon the writ of attachment reads as follows, to-wit:

"Received this order, July 3rd, 1895. July 3rd, 1895, at 3:30 o'clock P. M., I executed the same by going to the place where property of the within-named defendant, The Campbell Commission Company, described in the inventory and appraisment hereto annexed, was found, and there, at 3:30 o'clock P. M. of said day, in the presence and hearing of A. C. Bell and Fid Bishop, two credible persons, declared that, by virtue of said order, I attached said property at the suit of the within-named plaintiff, and, with A. C. Bell and Fid Bishop, two householders of the county, who were by me first duly sworn, did make a true inventory and appraisement of all of said property attached, which inventory and appraisement was by me and said householders signed, and is hereto annexed and returned with this order. I delivered a copy of this order, duly certified, to each of said defendants, ————. I cannot find the within named defendant, The Campbell Commission Company, in my county. Said property is in my custody, held subject to the order of the within named court.

I delivered said property so attached to ———, in whose possession it was found, upon the execution by such person, in my presence, of the undertaking herewith.

JNO. A. HANSEN, Sheriff.

(Printed Rec. 11 and 12.)

The only attack made upon this return was made by a motion to dismiss the said cause on the ground that it appeared, from the answer of the garnishee, that none of the defendant's property had been attached. The cause alleged in said motion could not exist if the officer's return were true. In dismissing the suit upon this ground, the Supreme Court of the Territory necessarily held that the official return on the writ of attachment was false, and necessarily vacated the return without requiring a direct attack to be made upon the same, and affording plaintiff an opportunity to prove or attempt to prove that the property attached did belong to the defendant, and that garnishee had waived his claim thereto.

AUTHORITIES.

1 Rice on Evidence, p. 218.
Miller vs. United States, 11 Wall., 268.
Brown vs. Kennedy, 15 Wall., 591.
Ladd vs. Wiggin, 35 N. H., 421.
Stevens vs. Brown, 3 Vt., 420.
Stewart vs. Stringer, 41 Mo., 400.
Folsom vs. Carli, 5 Minn., 333.
Stinson vs. Snow, 10 Maine, 263.
Whitaker vs. Sumner, 7 Pick. (Mass.), 551.
O'Connor vs. Silver, 26 Tex., 606.

FOURTH PROPOSITION.

A answer in garnishment when uncontroverted becomes conclusive evidence of the right of the garnishee to be discharged, but such an uncontroverted answer is not and never becomes evidence in any other than the garnishment proceeding. The judgment in garnishment discharging the garnishee is, except in the case of a direct attack, conclusive evidence that the garnishee has been discharged and is evidence of that fact in other and different proceedings from that in which it was rendered, but the mere answer of the garnishee when uncontroverted, even if upon its face it appears to entitle the garnishee to an immediate discharge is not evidence and has no legal effect in any other than the garnishment proceeding itself.

STATEMENT.

The answer in garnishment, after showing all facts which are required by statute for the discharge of a garnishee, sets out the contract between the garnishee, Pierce, and the Campbell Commission Company, and alleged that this contract had been carried out by the garnishee, Pierce, but that the payments therein called for had not been made by the Campbell Commission Company, except to the extent stated in the contract, and to the further extent of the proceeds of two thousand head of cattle sold in Wharton County, Texas. It also alleged that the garnishee, Pierce, had possession of the attached cattle, up to and at the time of making said answer, and that the rights of the Campbell Commission Company had been transferred to one T. A. Stoddard, by a transfer dated July 1st, 1895, but concerning which the garnishee did not pretend to state the true date of its execution. The garnishee prayed that he be discharged from garnishment, and that he be allowed his expenses and attorneys fees (Printed Rec. 19).

The statement in the answer in garnishment, that the gar-

nishee was then in possession of the attached property, was manifestly untrue, and was shown to be untrue, in the original case at least, by the official return endorsed upon the writ of attachment, and by the interplea of the said garnishee, Pierce, for in said interplea, which is also verified by affidavits, said Pierce shows that the attached property had been taken and was being detained from his possession, and that the taking and detention were under plaintiff's attachment (Printed Rec. 16). It was not true that the garnishee, Pierce, was holding the attached cattle, but if plaintiff had controverted the answer and had alleged and proved that this portion was not true or that Pierce had waived his title to the cattle and had only a lien thereon, still this did not tend to hold the garnishee, for he had nothing in his possession. The cattle had been taken from him and were being held under attachment, and he could not be charged because of cattle which he did not hold. The garnishee wanted to get a certain sum of money out of the proceeds of the attached cattle, and plaintiff was willing to concede his rights in this respect, and there was no reason for any dispute between the plaintiff and the garnishee, Pierce. On plaintiff's application, Pierce was appointed receiver, and, as receiver, he took charge of the cattle and sold them and paid himself out of the proceeds, thereby satisfying the obligation to him of the Campbell Commission Company under said cattle contract. There was a balance of more than twenty-two thousand dollars of the proceeds of said cattle, and this balance Pierce held subject to theorder of the court, and so reported to the court, and his report was on file and formed part of the record in the trial court and in the Supreme Court of the Territory, and forms part of the record here.

AUTHORITIES.

Shinn on Attachment, Vol. 2, Sec. 638.
Rood on Garnishment, 374.
Rice on Evidence, 983.

In this connection, plaintiff in error and appellant cites the following Oklahoma statutes, showing that, in that jurisdiction, garnishments are separate proceedings, and have separate issues, and are tried separately from the main suit, and that the statute providing that an answer in garnishment, not controverted within the time limited by law, shall be conclusively presumed to be true, is a statute regulating the procedure in garnishment cases, and has no application to any other matter than the controversy, or possible controversy, between the plaintiff and the garnishee. The section numbers given below are those of the Oklahoma Statutes of 1893, relating to civil procedure.

"*Section 4078.* Any creditor shall be entitled to proceed by garnishment in the district court of the proper county against any person (excepting a municipal corporation) who shall be indebted to, or have any property, real or personal, in his possession or under his control, belonging to such creditor's debtor, in the cases, upon the conditions, and in the manner hereinafter described."

Section 4079 provides at what time and in what manner a plaintiff may procure a writ of garnishment, and what bond shall be given.

Section 4080 provides for the issuance of writs of garnishment and for their service and return; and Section 4081 provides for additional garnishments by plaintiff, and that if a garnishee reside in a county other than that in which the original action is pending, the court may, on motion, change to the county of garnishee's residence the place of trial of any issue joined in a garnishment proceeding.

"*Section 4082.* Within twenty days from the service of such garnishee summons, the garnishee may, if the truth warrant, file with the clerk of the court in which the action is pending his affidavit, substantially in the following form:" * * * * * * "Thereby the proceedings against such garnishee shall be deemed discontinued and the plaintiff shall pay the garnishee two dollars for his costs, unless within twenty days thereafter the plaintiff serve notice

on such garnishee that he elects to take issue on such answer as garnishee and will maintain him to be liable as garnishee, in which case, the issue shall stand for trial as a civil action, in which the affidavit on the part of the plaintiff shall be deemed the petition and the garnishee's affidavit the answer thereto."

"*Section 4083.* Unless the garnishee shall make the affidavit provided for in Section 204, he shall, within twenty days from the service of the garnishee summons, file an affidavit in which he shall state—" * * * * * * * *

"*Section 4085.* The answer of the garnishee shall, in all cases, be conclusive of the truth of the facts therein stated, unless the plaintiff shall, within twenty days, serve upon the garnishee a notice in writing that he elects to take issue on his answer, in which case, the issue shall stand for trial as in a civil action, in which the affidavit on part of the plaintiff shall be deemed the petition, and the garnishee's affidavit the answer thereto. The plaintiff may, in all cases, move the court, upon the answer of the garnishee, and of the defendant if he shall also answer, for such judgment as he shall be entitled to thereon, but any such judgment shall be no bar beyond the facts stated in such answer."

"*Section 4087.* The defendant may, in all cases, by answer duly verified, to be served within twenty days from the service of the garnishee summons on him, defend the proceedings against any garnishee, upon the ground that the indebtedness of the garnishee or any property held by him, is exempt from execution against such defendant or for any other reason is not liable to garishment; or upon any ground upon which a garnishee might defend the same; and may participate in the trial of any issue between the plaintiff and garnishee for the protection of his interests. And the garnishee may at his option, defend the principal action for the defendant, if the latter does not, but shall be under no obligations so to do."

"*Section 4088.* The proceedings against a garnishee shall be deemed an action by the plaintiff against the garnishee and defendant, as parties defendant, and all the provisions for

enforcing judgment shall be applicable thereto; but when the garnishment is not in aid of an execution no trial shall be had of the garnishee action until the plaintiff shall have judgment in the principal action, and if the defendant have judgment, the garnishee action shall be dismissed with costs. The court shall render such judgment, in all cases as shall be just to all the parties and properly protect their respective interests, and may adjudge the recovery of any indebtedness, the conveyance, transfer or deliverly to the sheriff, or any officer appointed by the judgment of any real estate or personal property disclosed or found to be liable to be applied to the plaintiff's demand, or by the judgment pass the title thereto; and may therein, or by its order, when proper, direct the manner of making sale and of disposing of the proceeds thereof, or of any money or other thing paid over or delivered to the clerk or officer. The judgment against a garnishee shall acquit and discharge him from all demands by the defendant or his representatives for all money, goods effects or credits paid, delivered or accounted for by the garnishee by force of such judgment.

FIFTH PROPOSITION.

Even though it were true that upon the hearing of a motion to dismiss made by the defendant in an attachment suit upon the ground that the attached property does not belong to the defendant, an answer filed in an ancillary garnishment may be looked to as bearing upon the question of the ownership of the attached property, still such answer cannot, as between the plaintiff and the defendant, who are the parties to the motion, be conclusive of the question, nor can it have greater value as evidence than the sworn interplea filed in the attachment suit by the person who stands as garnishee and who has answed as such in the garnishment proceeding, or the official return endorsed on the writ of attachment by the officer who executed the same, nor has the answer in garnishment greater weight as evidence than the subsequent action of the garnishee as record of his official report as receiver of the attached property.

STATEMENT.

The substance of the answer in garnishment has been stated in this brief, and there is no need to repeat it here (See pages 9 to 12 of this brief). For a statement of the interplea filed in the main or original suit by A. H. Pierce, who was also garnishee in the garnishment proceeding, see page 12 of this brief. The official return of the sheriff of Noble County, Oklahoma, as endorsed on the writ of attachment, is set out in full on page 38 hereof. The substance of the order appointing A. H. Pierce, garnishee in the garnishment proceeding and interpleader in the main suit, as receiver of the attached property, is stated on page 13, and the acceptance of said appointment by said Pierce is set out on page 13 hereof, while the substance of the report of said Pierce as such receiver can be found by reference to page 13.

AUTHORITIES.

SIXTH PROPOSITION.

The question of the ownership of attached property is not open for consideration in an appellate tribunal when the ruling of the lower court thereon has not been assigned as error, or presented for consideration in any of the briefs filed in or arguments made before such appellate tribunal and when no trial was had in the lower court of the issue as the ownership of said property and no evidence was introduced and no opportunity was afforded for the introduction of such evidence.

STATEMENT.

The question as to the ownership of the attached property was raised by the motion to dismiss, filed in the trial court by the defendant, the Campbell Commission Company, in the following words, to-wit;

Third. Because there has been no seizure of any of defendant's property, within the jurisdiction of this court, either by attachment or garnishment process, and reference is hereby made to the fact that the defendant has and had no interest in the property attempted to be seized and garnisheed in this cause—which said—disclosing such facts, never joined issue nor served any notice of taking issue on such answer. Whereby the said answer became and conclusively establishes the fact that none of this defendant's property has been seized as a basis for any pretended constructive service" (Printed Rec. 49).

The Campbell Commission Company was defendant in error in the Territorial Supreme Court. Its assignments of errors read as follows, to-wit:

"Comes now the defendant in error, and hereby assigns its cross-errors, as follows, for the consideration of said court, in case the petition in error shall be sustained:

"The defendant in error insists that the ruling of the court below would still be right in this case, on the grounds stated in the motion, and which were denied by the court below, and,

in the event of the reversal of the court below on the grounds stated, alleges error in the court below.

"*First.* In holding the notice for publication sufficient.

"*Second.* In holding the attachment proceedings valid, notwithstanding the failure to execute the bond or undertaking in attachment, and, in the event that the court below shall not be sustained upon the ground of its ruling, asks that said cause still be affirmed upon the grounds herein specified" (Printed Rec. 5).

The briefs filed in the case in the Supreme Court of the Territory did not refer to the action of the trial court in overruling the third ground of defendant's plea to the jurisdiction, and no mention of the question was made in argument before that court.

The judgment of the trial court shows that the motion was heard and considered on the face of the record, as it stood when the hearing of the motion began, and that no evidence was introduced or considered, other than those matters of which the court took judicial notice because disclosed by the record in the cause (Printed Rec. 50 and 57).

AUTHORITIES.

Leavenworth vs. Atchison, 37 S. W., 914.

SEVENTH PROPOSITION.

The contract set out in the answer of the garnishee, Pierce, discloses the fact that the defendant, the Campbell Commission Company, had an attachable interest in the attached cattle, and the report filed by Pierce, as receiver, shows that all his demands against the cattle have been fully satisfied, and that the remaining proceeds, being over twenty-two thousand dollars, are subject to plaintiff's attachment. While the answer in garnishment does not pretend to state when the transfer by the Campbell Commission Company to T. A. Stoddard was made, or that it was made before said cattle were taken under plaintiff's attachment, and if the answer in garnisnment be taken as true, still, the court erred in holding that no property had been brought within the jurisdiction of the court and subjected to plaintiff's demand.

STATEMENT.

The contract set out in the answer in garnishment is copied in full on pages 9, 10 and 11 of this brief. Pages 39 and 40 of the printed record show the appropriation by the receiver, A. H. Pierce, who, out of the proceeds of the attached cattle, paid to himself the amount of his entire demand against the Campbell Commission Company under said contract. Pages 27 and 28 of the printed record show the appointment of said Pierce as receiver of the attached cattle, and, by that part of the order set out on page 28 of said record, said Pierce is expressly authorized to sell said cattle, and to retain the amount owing him under said contract. The answer in garnishment alleges that prior to July 6th, 1895, on which day said Pierce was served with a summons in garnishment, he was notified of a transfer by the Campbell Commission Company to one T. A. Stoddard of the said contract. This transfer was dated July 1st, 1895, but the answer in garnishment does not pretend to say when it was

executed, or that it was ever executed, or that it was an actual transfer in good faith (Printed Rec. 22).

AUTHORITIES.

McNamara vs. Culver, 22 Kan., 668.
Jones on Mortgages, Sec. 265.
Glover vs. Payne, 19 Wendell, 518.
Overstreet vs. Baxter, 30 Kan., 232.
Eckert vs. McBec, 27 Kan., 232.
Tusts vs. Beach (Col.), 44 Pac., 771.
Savings Bank vs. Theater Co. (Col.), 36 Pac., 902.
Hart vs. Mfg. Co., 7 Fed. Rep., 553.
Hervey vs. Locomotive Works, 93 U. S., 664.
McCormick vs. Hadden, 37 Ill., 370.
Ketchum vs. Watson, 24 Ill., 591.
Herryford vs. Davis, 102 U. S., 235.
Oklahoma Statutes of 1893, Sec. 3181.
Chicago vs. Merchants, Etc., Bank, 136 U. S., 286.
Arkansas vs. Mann, 130 U. S., 69.
4 Kent's Com., p. 144.
Hutzler vs. Philips (S. C.), 4 Am. St. Rep., 699.

EIGHTH PROPOSITION.

It does not appear by any statement made in the answer in garnishment of A. H. Pierce, that the transfer to Stoddard was ever in fact executed, or that any actual transfer existed, the answer in garnishment merely averring that the garnishee has notice of a purported transfer which garnishee sets out, and afterward pleads its legal effect if it should be found to exist.

STATEMENT.

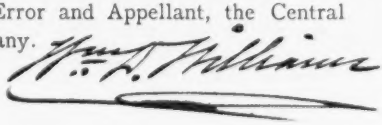
The Supreme Court of the Territory in this opinion, says: "The answer of the garnishee showed * * * that the defendant, at the time of the service of the garnishment, had no interest whatever in said" (attached) "property, having transferred and assigned whatever interest he" (it) "might have had, by virtue of said contract, to one Stoddard, in trust, to be applied in the payment of certain of his" (its) "debts, amounting to more than any interest which he" (it) "might have had in said property." The Supreme Court persisted in this erroneous statement of facts, notwithstanding the motion for rehearing made by the Central Loan and Trust Company. The answer of the garnishee states that, "prior to July 6th, A. D. 1895, this garnishee received notice that an assignment had been made of said contract, by said Campbell Commission Company, to T. A. Stoddard, as trustee, which assignment is in words and figures as follows:" Here follows copy of the assignment (Printed Rec. 22). After stating the proposed assignment, the answer continues as follows: "The said garnishee, A. H. Pierce, is informed and so charged that, by reason and in virtue of said assignment, all the right, title and interest of said Campbell Commission Company, of, in and to said contract, whatever the same may have been at the time of said assignment vested, became transferred to and is now owned and held by said Stoddard as such trustee." The latter extract from the

answer of the garnishee pleads conclusions of law, and nothing else, and, under the well settled rule in such cases, it is not required to be traversed, and the answer stands without any allegation of the actual existence of a transfer from the Campbell Commission Company to T. A. Stoddard, and without any allegation as to the date of the execution of such transfer. Hence we say that the Supreme Court erred in the statement which it made as quoted above. In addition to this, that portion of the statement of the Supreme Court of the Territory above quoted, which says, in effect, that the answer of the garnishee shows that the Campbell Commission Company had transferred its interest in said contract to Stoddard, to be used in paying debts amounting to more than the interest of said defendant Commission Company in said contract, is equally far from the facts. The garnishee does not pretend to say what was the value of the Campbell Commission Company's interest in said property. In the view taken of this case by the attorneys of the Central Land and Trust Company, these matters are not very natural, but it would certainly be more satisfactory if the Territorial Supreme Court, having before it a printed record, and believing such questions to be material, would take the trouble to ascertain the facts as they appear of record, before deciding a case.

It is respectfully submitted that the judgment in this cause should be reversed and the cause remanded for trial.

WILLIAM D. WILLIAMS,

Attorney for Plaintiff in Error and Appellant, the Central Loan and Trust Company.



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